No. 92-1479

In The
Supreme Court of the United States
October Term, 1992

McDERMOTT, INC.,
Petitioner,

v.

AMCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. AND
RIVER DON CASTINGS, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, SUGGESTING REVERSAL

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QUESTIONS OF LAW PRESENTED

1. How should a plaintiff's settlement with one defendant be accounted for in entering judgment against other defendants?

2. Should either settling or non-settling defendants be permitted to seek contribution from the other?

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* suggesting reversal of the decision below of the Court of Appeals. Both Petitioner and Respondent have consented to MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899.

It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests--shipowners, charterers, cargo owners, shippers, forwarders, port authorities, stevedores, seamen, longshoremen, passengers, marine insurance brokers and underwriters and other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety-four years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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[1] 46 U.S.C. §§ 1300-1315 (1988).

[2] 9 U.S.C.A. §§ 1-16 (West Supp. 1993).

[3] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 161 (1992); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073 (1988).

MLA's Committee on Maritime Personnel appointed a subcommittee in 1988 to study the conflicting methods employed by federal courts in reducing judgments entered against one defendant to account for settlements reached by the plaintiff with other defendants. That subcommittee represented the views of both plaintiffs and defendants. It submitted a report in the spring of 1990, endorsed by its parent committee, which recommended a set of rules which, for the most part, track the provisions of the Uniform Comparative Fault Act, 12 U.L.A. 43 (Supp. 1993) ("UCFA"). Subsequently, a resolution was unanimously adopted at MLA's Annual Spring Meeting on May 4, 1990, authorizing MLA sponsorship of legislation which would codify those rules.[4] As a result of MLA's further efforts, the Hon. Helen Delich Bentley introduced draft legislation on September 12, 1991. H.R. 3318, 102d Cong. 1st Sess. (1991). A copy of that Bill, referred to hereafter as "the MLA Bill," is reproduced in the appendix to this brief.[5] MLA sought passage of that Bill to obtain uniformity in this area of maritime law.

The quest for uniformity in maritime law has long been of great importance to MLA. It has been repeatedly expressed by our membership and standing committees. For example, in 1975 MLA's Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade con-

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[4] MLA Minutes, MLA Doc. No. 683 at 9625-28 (1990).

[5] The Bill died in the House Judiciary Committee at the end of the last term. MLA is currently working with members and staff of that Committee with a view to reintroducing the Bill this term. Of course, the opinion in this case will likely have an impact on the need for the Bill, and thus further legislative action will probably await that opinion.

gressional committees "that nationwide and, in fact, worldwide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at MLA's Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by MLA on several occasions, most recently in a 1986 resolution.[7]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law and the future course of maritime litigation generally. Such a situation exists in this case. Application of differing rules related to settlements by one joint tortfeasor in maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and consequently the practices of MLA's attorney members and the affairs of their clients.

MLA also has a strong interest in having substantive rules developed which promote admiralty's historic goal of equity. The rules set out in the MLA Bill are designed to be nonpartisan,[8] to furnish all maritime litigants with certainty

[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986). This Court has often expressed the same philosophy. *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). *See also* Henry M. Hart, Jr., *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84, 148 (1959).

[8] *See* Paul S. Edelman, *The Federal Maritime Comparative Responsibility Act*, N.Y.L.J., Nov. 1, 1991, at 3. Mr. Edelman was the plaintiff representative on the MLA subcommittee which drafted the bill.

respecting the mechanics of a settlement credit and to provide the judiciary with a workable solution to these difficult issues. Accordingly, MLA's Executive Committee voted, without dissent, to submit this brief, not in support of either party, but in support of adoption by this Honorable Court of certain principles contained in the MLA Bill.[9] Adoption of those rules would require reversal of the opinion below.

SUMMARY OF ARGUMENT

When a plaintiff settles with one defendant and then proceeds to trial against others, some adjustment to account for the settlement must be made when entering judgment. Some courts, including the Court of Appeals below, have reduced the judgment by the dollar amount of the settlement. This is generally referred to as a *pro tanto* credit. Other courts have reduced the judgment by that percentage of the overall damages which equals the settling defendant's proportionate fault in causing the loss. This will be referred to herein as a "proportionate credit."[10]

[9] The case before the Court is a property damage case, to which the MLA Bill would not have applied *ex proprio vigore*. Maritime property damage litigation may involve complications or legal principles not typically encountered in personal injury claims. The impact here of McDermott's contract with AmClyde is an example of such a complication. Because settlement credit problems appeared to arise far more frequently in personal injury litigation, MLA decided to limit the scope of the MLA Bill to those cases. Identical credits have been applied to property damage claims, however, and the reasons for selecting a proportionate credit, discussed *infra*, would seem to apply equally to property damage. MLA's decision to submit this brief is based at least in part on concern that the rules announced in this case will be applied by lower courts in future personal injury litigation.

[10] Some courts have referred to such a proportionate reduction as a "*pro rata*" credit. MLA has consciously avoided use of that term to avoid confusion with "*pro rata*" credits applied in some states which reduce awards based on the numbers of settling and non-settling defendants.

Although no solution is perfect under all circumstances, the proportionate credit is superior in most respects. It is fair to all the litigants, because the parties to the settlement keep the benefit of their bargain and the non-settling defendants remain liable for that percentage of the plaintiff's damages caused by their own proportionate fault. Settlement is encouraged, because each defendant is able to weigh the extent of its own liability without regard to the impact of another party's settlement. Since the adequacy of settlements does not have to be determined, ancillary litigation is avoided. And a proportionate credit fully comports with the trend in maritime law towards pure comparative fault.

The proportionate credit also eliminates the need for contribution claims between settling and non-settling parties in most situations,[11] because the non-settling defendants pay their share of the plaintiff's loss, and not any part of the shares of settled defendants. Adoption of a *pro tanto* credit, however, would require the Court to examine contribution rights, since a maritime defendant paying more than its share of the plaintiff's recovery may generally seek contribution from a joint tortfeasor which has paid less than its share. Thus, contribution problems will be avoided, and equity and judicial economy will be promoted, by adoption of a proportionate settlement credit.

This case presents another opportunity for this Court to carry out its constitutionally mandated function of formulating admiralty and maritime guidelines in a way which will fairly encourage compromise and enable lower courts to adjudicate harmoniously the rights and liabilities of non-settling parties.

For example, if one defendant settled and two others were held liable at trial, such a "*pro rata*" credit would be one-third of the award, without regard to the amount paid in settlement or the relative culpability of the tortfeasors.

[11] A single exception is described in note 13, *infra*.

ARGUMENT

I.
INTRODUCTION

While other variations are possible, courts applying settlement credits in the maritime context have typically followed either the formulation set out in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), or that announced in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). *Leger* adopted the proportionate credit, under which non-settling defendants received a credit for that portion of the plaintiff's damages caused by the fault of the settling defendants. Stated conversely, the non-settling defendants in *Leger* were liable for that part of the plaintiff's loss caused by their combined negligence. *Self*, on the other hand, opted for a dollar-for-dollar or *pro tanto* credit, to be applied regardless of the proportionate fault of the settling and non-settling defendants.[12] The MLA Bill proposes a proportionate credit in accord with *Leger*.

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[12] The following hypothetical illustrates the problem now before the Court. Plaintiff ("P") brings an action against defendants A, B and C. P settles with A before trial for $25,000. At trial, fault is found in the following percentages:

P: 10%
A: 20%
B: 30%
C: 40%

P's damages are assessed at $100,000. How is the Court to account for P's settlement with A in entering judgment against B and C?

Under any credit, P would absorb 10% of the loss on account of his own contributory negligence. A *Leger* credit would be for A's 20% share of P's damages and would result in judgment being entered jointly and severally against B and C for $70,000, their combined 70% share of P's damages. Under *Self*, P's damages would be reduced first by his own

II.

THE AVAILABILITY OF CONTRIBUTION MUST BE CONSIDERED WHEN SELECTING A SETTLEMENT CREDIT MECHANISM

This case, in theory, presents only the question of how to calculate the amount of the credit to non-settling tortfeasors.[13]

10% fault and then by the $25,000 settlement. Thus, judgment would be entered against B and C jointly and severally for $65,000.

This example represents a favorable settlement by P. If P had received only $15,000 in settlement from A, under the same fault allocation the *Leger* credit would remain unchanged. Under *Self*, however, the judgment against B and C would be $75,000. This would represent an unfavorable settlement by P.

[13] The MLA Bill addresses the full range of problems associated with multi-party personal injury litigation which the Commissioners on Uniform State Laws had considered while creating the UCFA in 1977. Maritime scholars have advocated reference by admiralty courts to this draft legislation. *See* David R. Owen and J. Marks Moore, III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 959 (1983).

The UCFA contained some provisions already well established in maritime law, such as proportionate reduction of the plaintiff's damages on account of contributory negligence. In addition to a proportionate settlement credit, the UCFA also precluded contribution in most circumstances. Contribution is permitted only when one defendant settles the plaintiff's entire claim, thereby buying the other defendants peace for a fair price. Finally, the UCFA offered rules for dealing with insurance offsets and non-paying defendants. The latter rule, known as "reallocation," appears in § 3(d) of the MLA Bill. The House Judiciary Committee has raised some concern about the inclusion of reallocation in the bill, due largely to its partisan impact, and its legislative future is uncertain. For that reason, and because reallocation is not before the Court, MLA is not now urging the Court to adopt, or to reject, the principles of § 3(d) of the MLA Bill. Indeed, MLA believes that the Court need not and should not address the issue in deciding this case. Debate over reallocation should properly await another day in another forum, when MLA's constituent member groups would be free to urge adoption of their respective positions.

That determination, however, is closely related to the rules governing contribution, also dealt with by the MLA Bill, § 5. Because the fairness of *pro tanto* and proportionate credits depends in part on the availability of contribution, and because the availability of contribution will always be an issue whenever a settlement is for an amount different from the settlor's proportionate fault, MLA urges the Court to announce a rule that, while formulating a credit methodology, also determines whether any defendant, either settling or non-settling, has a right to seek contribution.

The problems which arise from piecemeal resolution of these issues are well illustrated by the saga of *Self*. The Eleventh Circuit, reasoning that *Leger* had been undercut by *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), opted for the *pro tanto* credit. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. It gave conflicting signals, however, regarding the availability of contribution. While it stated initially that "contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and had been released by the claimant," *id.* at 1547,[14] it later suggested twice that the non-settlor retained its right to seek contribution. *Id.* at 1556, 1557.

On remand, the district court did not permit contribution, but the Eleventh Circuit again reversed. *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992). Noting that this Court, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), had established a system of loss allocation based on proportionate fault, it concluded that the *pro tanto* credit adopted in *Self* required it to reject the so-

[14] The Fifth Circuit cites *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), for this proposition. However, *Luke*'s contribution bar was determined under Louisiana law, and not federal maritime law.

called "settlement bar" rule and permit Great Lakes to pursue its contribution claim. 957 F.2d at 1582-83. Interestingly, the Eleventh Circuit opinion implies that the panel would have preferred to return to *Leger*. However, after stating that "*Edmonds* clearly does not overrule *Leger* directly," the panel noted that it was bound by the court's earlier opinion in *Self*. *Id.* at 1580 n.4.

If the Eleventh Circuit had analyzed the credit and contribution issues together initially, different rules might well have resulted. Instead, maritime defendants in the Eleventh Circuit are now unable to settle without being subject to claims for contribution by other defendants,[15] a result which has almost uniformly been condemned.[16] MLA urges this Court to dispel *Self*-type problems and retrospectives by considering, in the context of this litigation, both the form of the credit and the availability of contribution.

III.

THE COURT SHOULD ADOPT THE PROPORTIONATE CREDIT AND CONTRIBUTION BAR FEATURES OF THE MLA BILL

A number of federal courts have analyzed the relative merits of the *Leger* and *Self* credits,[17] although none has considered

[15] Theoretically, the settling defendant could secure an indemnity or hold harmless agreement from the plaintiff, thereby insulating it from further liability and trial expenses. Plaintiffs may be reluctant to give such assurances, however, and the current Eleventh Circuit rules are certain to have a chilling effect on the settlement process generally.

[16] An excellent discussion of contribution issues appears in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989), which approves a settlement bar without deciding which credit formula should prevail.

[17] *See, e.g., Matter of Oil Spill of the Amoco Cadiz*, 954 F.2d 1279, 1314-18 (7th Cir. 1992); *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991); *In re The GLACIER BAY*, 1993 A.M.C. 1530 (D. Alaska 1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991). *See also* Graydon S. Staring, *Meting Out Misfortune: How the Courts Are Allotting the Costs of Maritime Injury in the Eighties*, 45 La. L. Rev. 907, 923-25 (1985) (advocating *Leger*).

the continuing viability of the *Self pro tanto* credit in light of the Eleventh Circuit's final conclusion that contribution rights must follow.[18] No formulation is free from criticism or able to protect litigants from perceived unfairness in every circumstance. Nonetheless, MLA is convinced that the *Leger* principles, as set out in the MLA Bill, offer by far the best and fairest framework for dealing with the issues.

A. *A Proportionate Credit Will Best Promote Fair Settlements*

The debate over *Self* and *Leger* credits has manifested disagreement about which method best encourages settlements. Each promotes settlement in some respects, but for differing reasons, not all worthy of endorsement.

Most of the inducement to settle arising from a *Self pro tanto* credit comes directly at the expense of fairness. Since the plaintiff will always recover in full if any non-settling party is liable at trial, there is little incentive for the plaintiff to act responsibly in negotiating settlements early in the litigation with other parties. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Some courts refer to the prospect of outright collusion. *See, e.g., McDermott, Inc. v. Iron*, 979 F.2d 1068, 1080 (5th Cir. 1992),

[18] An excellent and detailed analysis of *Self* appears in *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993). While within the Eleventh Circuit, the Alabama Supreme Court did not consider itself bound by *Self*, particularly in light of the conflict among the circuits. *Id.* at *6 n.1. Instead, it analyzed the alternatives, selecting the *Leger* approach as "the appropriate method for the disposition of maritime cases filed in Alabama state courts." *Id.* at *12.

cert. granted, 125 L. Ed. 2d 721 (1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 221 (S.D.N.Y. 1991). It will be the non-settling defendant who bears the full brunt of any such agreement, without any opportunity to influence it. The only advantage of *Self* with a settlement bar to contribution is certainty. This Court, however, held in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975), that certainty which was unfair could no longer be approved in maritime law. Moreover, now that the Eleventh Circuit has held contribution to be available from the settling defendant following a *Self* credit, any perceived inducement to settle has likely evaporated.

The impact of credit rules on the willingness of non-settling defendants to settle will also depend upon perceived equities and litigation strategy. Under *Self*, it is argued, the non-settling defendant knows exactly what its share will be, and therefore will be encouraged to settle. Sometimes, however, just the opposite occurs. A non-settling defendant who believes that other defendants have paid too much in settlement might become intransigent regarding settlement in the hope that the *pro tanto* credit will reduce its potential payment exposure, if not eliminate it altogether. Indeed, that might have occurred below. River Don was found at trial to be 38% responsible for damage to the deck. However, by going to trial and obtaining a *Self pro tanto* credit, it limited its liability to $470,000,[19] or about 22% of the damage to the deck. Therefore, the *pro tanto* credit in this instance may well have served to *discourage* settlement. It will undoubtedly have that effect in some cases.

[19] $2.1 million in damages reduced to $1.47 million by the 30% fault of McDermott and the sling defendants and then to $470,000 on account of the $1 million settlement. Theoretically, if the settlement of the "sling defendants" had been $1.5 million, River Don would have paid nothing! That result promotes neither settlements nor fundamental fairness.

Leger avoids the taint of unfairness and discourages legal gamesmanship without giving up the bar to contribution which promotes settlements. *See Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266, 1271 (8th Cir. 1991); *Leger v. Drilling Well Control, Inc.*, 592 F.2d at 1250-51; *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222-23 (S.D.N.Y. 1991). *But see Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992) (effect on settlements uncertain). The settlement process has always depended upon the ability of plaintiffs and defendants to assess with reasonable accuracy the size of the likely award. The normal balancing of litigation risks which occurs under proportionate fault promotes that process. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Moreover, several courts have recognized that proportionate loss allocation prompts bargaining which typically leads to *fair* settlements. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d at 1271; *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. The proportionate credit, by eliminating the prospect for a litigant to hide behind someone else's settlement, and by holding all defendants responsible for their own fault, will ultimately encourage settlement by all parties.

B. *A Proportionate Credit Will Prevent Ancillary Litigation*

Judicial economy will be advanced through adoption of a proportionate credit joined with a settlement bar. Jurisdictions which now have *pro tanto* credits typically also provide for a hearing to determine whether a settlement was made in good faith and for adequate consideration.[20] If such a hearing

[20] California, for example, has such a rule, but federal courts have been reluctant to borrow such state law provisions in maritime cases. *See, e.g., Daughtry v. Diamond M Co.*, 693 F. Supp. 856 (C.D. Cal. 1988).

is to be meaningful and offer any hope of realistic protection for non-settling defendants, it would seem that a mini-trial of sorts would be required. That in turn requires discovery, raises the prospect of legal motions, and generally places putative settlors in exactly the position they sought to avoid. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582; *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (a securities case applying federal common law); *In re The GLACIER BAY*, 1993 A.M.C. 1530, 1535-36 (D. Alaska 1993). The alternative is a low threshold of inquiry in which courts will decline to analyze in detail the adequacy of any settlement thought to be arguably reasonable. Such review offers scant protection to non-settling defendants. The *Leger* proportionate credit avoids these problems by leaving the adequacy of a settlement exactly where it belongs: as a matter solely between the plaintiff and the settling defendant.[21]

The proportionate credit eliminates the basis upon which either settling or non-settling defendants might otherwise seek contribution from the other. The non-settling defendants, liable for no more than their proportionate share of plaintiff's damages, cannot satisfy the underlying premise of contribution that one tortfeasor paying more than his fair share may seek equitable relief from another paying less than his share.

[21] Adoption of a proportionate credit would effect further judicial economy in connection with an atypical aspect of this case. No determination was made at trial of the separate degrees of fault of plaintiff McDermott and the settling "sling defendants." A *Self pro tanto* credit should be applied against plaintiff's damages, reduced only by the plaintiff's own contributory fault. It appears that the result below also may have reduced the damages by the degree of fault of the settling defendants *before* applying the settlement credit. That, of course, would constitute a double reduction. Application of a proportionate credit makes this inquiry unnecessary, since the proportionate credit is for the *combined* fault of the plaintiff and the settling defendants.

Similarly, settling defendants who paid too much will have no claim against non-settling defendants, because they will not have paid less than their fair share. Of course, contribution will remain available among two or more non-settling defendants found liable to the plaintiff.[22]

The proportionate credit has not been immune from criticism that it requires ancillary litigation. Those criticisms, however, are unjustified. The Seventh and Eleventh Circuits have pointed to perceived problems in determining the share of the settled party. *See Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982). Litigants, however, have always had to deal with the fault of non-parties. A defendant will often argue that some party not present was the *real* cause of the accident.[23] In such circumstances, the conduct of all the players is before the jury. Asking them to determine the proportionate fault of an absent party whose conduct has been proven at trial will not create additional difficulty. Moreover, since the plaintiff has voluntarily agreed to settle with a party, it could clearly have arranged with that party to make key witnesses available as a part of the bargain. Thus, any inferred burden on plaintiffs is largely illusory. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 223-24.

Another suggested administrative reason not to apply *Leger* is a perceived inefficiency, from the standpoint of both time and money. The *Amoco Cadiz* court suggested that *Leger*

[22] In the hypothetical, *supra* note 12, if plaintiff collected his entire $70,000 judgment from B, B would in turn have an action for contribution against C for C's "equitable" share of $40,000.

[23] This is particularly true in longshore personal injury litigation. While the stevedoring company is statutorily immune from contribution claims, the shipowner is free to argue that the stevedore's fault was the sole proximate cause of the accident, thereby seeking to escape liability itself. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 265 n.15 (1979).

would require additional litigation since the settled party had not participated. 954 F.2d at 1317-18. The court's comment was probably due in part to frustration over the size and complexity of that particular litigation. Few cases will equal it. Thus, the *Amoco Cadiz* litigation is a poor foundation for the creation of policy for the average case. Moreover, it is not clear exactly what additional litigation would be required. The plaintiff's claims could be reduced under *Leger* without the need to involve the settled party. The burden would be on the non-settlors to prove fault of the settled party, so no inequity to the plaintiff should result. Interestingly, even the *Self* court describes *Leger* as "efficient." 832 F.2d at 1548.

C. *A Proportionate Credit Will Promote Fundamental Fairness*

An essential feature of settlement credit rules should be fairness to *all* of the litigants. The proportionate credit is far superior to the *pro tanto* credit in this respect. The parties to the settlement should have no complaint, for they will have received exactly that for which they bargained. Moreover, the plaintiff will usually have received the settlement proceeds relatively early in the proceedings, and the settling defendant will have avoided contribution exposure and further litigation of that issue. Non-settling defendants may not complain, because under *Leger* they remain responsible only for their share of the plaintiff's loss, no more and no less.

While *Leger* serves to avoid outright collusive settlements, it also avoids the *appearance* of collusion and the myriad situations in which a non-settling defendant might otherwise be complaining to the court of a settlement tactically structured to the non-settlor's disadvantage. This case provides an illustration. While the opinion below notes, 979 F.2d at 1080, that the settlement was not allocated between damage to the deck and damage to the crane until *after* the verdict, McDermott

and the "sling defendants" might have allocated the settlement in advance of trial, either sealing the allocation with the court or disclosing it to all parties. Because other maritime theories suggested that the sling defendants alone might be liable for damage to the crane,[24] the settlement might logically have allocated most, if not all, of the settlement proceeds to crane damage. Such a pre-trial allocation might have received a more receptive review below. Had it been embraced by the court, the amount of River Don's credit would clearly have been reduced significantly. But that credit should not logically depend on factors controlled solely by the parties to the settlement. Under *Leger*, the allocation would be irrelevant. River Don would be responsible for its proportionate share of damage to the deck, regardless of how McDermott and the sling defendants allocated their settlement. Fundamental fairness requires that result.

D. *A Proportionate Credit Will Further the Trend in Maritime Law Toward Pure Comparative Fault*

A *Self pro tanto* credit, when combined with a bar to contribution, runs head first against the proportionate loss allocation principles of *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975). A non-settling tortfeasor, like Great Lakes Dredge & Dock Co. in *Self*, will be required to pay more than its proportionate share of the plaintiff's damages without being permitted a right of contribution against a joint tortfeasor who settled for less than its fair share. *Cooper Stevedoring* and *Reliable Transfer* simply do not permit such a result. From a legal standpoint, *Leger*'s

[24] AmClyde was protected from liability for crane damage by its contract with McDermott, and River Don was protected by the damage principles announced in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). 979 F.2d at 1077-78.

greatest strength is its harmony with *Cooper Stevedoring* and *Reliable Transfer*.

While *Self* interpreted *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), 269-70, as precluding *Leger*'s proportionate fault credit for settlements, 832 F.2d at 1546-47, that analysis failed to comprehend or take into account the narrow context in which *Edmonds* arose. While recognizing that some inequity to shipowners resulted, 443 U.S. at 269-70, the *Edmonds* Court felt obligated not to interfere with the "delicate balance" between shipowners, stevedoring companies and longshoremen which existed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1988). 443 U.S. at 273. No such "delicate balance" is presented in the settlement credit context. *Edmonds* did not address settlement issues. Furthermore, settling defendants typically enjoy none of the statutory immunities so important to the decision in *Edmonds*.

Edmonds is also invoked for the proposition that *Leger* improperly creates the risk that a plaintiff will recover less than full damages. *See, e.g., Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318. It is true that a plaintiff may accept less from a settling defendant than that defendant's share of the damages is subsequently determined to be. However, the converse is also true—a plaintiff may obtain a favorable settlement above what the settling party's share is later worth. Permitting the plaintiff to keep the benefit of his bargain is no more a double recovery than any "shortfall" resulting from a bad settlement would be a contravention of the *Edmonds* policy of full compensation.[25] *Leger* explained that no double

[25] In *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993), the court discussed "the perceived tension between Leger and Edmonds," concluding that no such tension need exist. *Id.* at *10-*11. Another excellent discussion of the "tension between *Edmonds* and *Reliable Transfer*" appears in *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222.

recovery would occur because settlement dollars, obtained at a time of uncertainty, cannot be equated with damages at trial. 592 F.2d at 1249-50, 1250 n.10. Every settlement necessarily presents the risk that a defendant may have paid too much and the plaintiff may have accepted too little. But that is no reason not to promote settlements. Indeed, acceptance of a known, sure recovery at the expense of an uncertain, but possibly greater recovery at trial is the very essence of settlement.

Settlements are entered into willingly with the expectation that a party's interests will thereby be served. Surely it cannot be doubted that a plaintiff could settle his claim while the jury was deliberating for a lesser amount than the jury was prepared to award without offending the court's sense of fairness to the plaintiff. The same principle applies to earlier, partial settlements. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222-24. Accordingly, *Edmonds* does not require rejection of a *Leger* credit. *See id.* at 224. *See also* Evan T. Caffrey, Comment, *Holding the Bag-Proportional Fault and the Non-Settling Defendant: Self v. Great Lakes Dredge & Dock Co.*, 14 Tul. Mar. L. J. 415, 420-22 (1990).

IV.
IT IS ENTIRELY APPROPRIATE FOR THE COURT TO FASHION THESE RULES, AND NOT DEFER TO CONGRESS

The constitutional grant of admiralty and maritime jurisdiction is to federal courts, in Article III. No other field of substantive law was the subject of such treatment. From the beginnings of the nation, this Court has been the leading promulgator of rules for maritime loss apportionment.[26] That

[26] For an excellent dissertation of judicial development of this topic, *See* Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304 (1957).

role has flourished in the last two decades with the opinions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Here, as there, Congress has not spoken. Thus, reference to legislative policy is not appropriate here, as it was in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Moreover, the issues presented herein are particularly appropriate for judicial determination, inasmuch as they concern the mechanics of maritime trials and settlement of maritime claims.

The lofty tradition of this Court's historical role as the primary framer of maritime law, as evidenced by such opinions as *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), was recently discussed by the late, renowned admiralty jurist, The Hon. John R. Brown. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. Mar. L. & Comm. 249 (1993). This case provides a particularly apt opportunity for this Honorable Court to exercise its formative role, established by the United States Constitution, in development of the general maritime law of the United States.

V.
CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to adopt a proportionate settlement credit rule, together with a contribution bar, in accord with those provisions in the MLA Bill.

Respectfully submitted,

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APPENDIX

102D CONGRESS—1ST SESSION
H.R. 3318

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

IN THE HOUSE OF REPRESENTATIVES
SEPTEMBER 12, 1991

MRS. BENTLEY introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Maritime Comparative Responsibility Act".

SEC. 2. EFFECT OF CONTRIBUTORY FAULT.

(a) Any contributory fault chargeable to a claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault but does not bar recovery.

(b) Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

SEC. 3. APPORTIONMENT OF DAMAGES.

(a) In an action involving fault of more than one party to the action, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating—

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded;

(2) the percentage in which the contributory fault, if any, of each claimant has contributed to causing that claimant's injury; and

(3) the proportionate relationship of the fault of each of the other parties to each claim.

For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the proportionate degree of fault of each party to an action, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in an action in accordance with the findings, subject to any reduction under section 7, and enter judgment

jointly and severally against each party liable. For purposes of contribution under sections 5 and 6, the court also shall determine and state in the judgment each party's share of the judgment of each claimant in accordance with their respective proportionate fault.

(d) Upon motion made not later than one year after judgment is entered in an action, the court shall determine whether all or part of a party's share of a judgment is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties to the action, including a claimant at fault, according to their proportionate fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

SEC. 4. SET-OFF.

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party, and any distribution of those funds back to the party making payment had been a payment to that party by the other party.

SEC. 5. RIGHT OF CONTRIBUTION.

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury or death, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's proportionate share of a claimant's recovery, as determined in accordance with section 3.

(b) A person who enters into a settlement with a claimant has a right to contribution from other persons only (1) if the liability of the person against whom contribution is sought has been extinguished by the person seeking contribution and (2) to the extent that the amount paid in settlement was reasonable.

(c) This Act does not affect any rights of or to indemnity which otherwise exist.

SEC. 6. ENFORCEMENT OF CONTRIBUTION.

(a) If the proportionate fault of the parties to a claim for contribution has been established previously by the court, as provided by section 3, a party paying more than that party's proportionate share of the common liability shall, upon motion, be entitled to a judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a

judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution shall be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have—

(1) extinguished the common liability within the period of the statute of limitations applicable to the claimant's right of action against the person from whom contribution is sought and commenced the action for contribution within one year after payment, or

(2) agreed while the action was pending to extinguish the common liability and, within one year after the agreement, have done so and commenced an action for contribution.

SEC. 7. EFFECT OF RELEASE.

A release, covenant not to sue, or similar agreement entered into by a claimant and a person alleged to be liable for that claim—

(1) discharges that person from all liability for contribution,

(2) does not discharge any other persons alleged to be liable for the same claim unless it so provides, and

(3) reduces the claim of the releasing claimant against other persons by the amount of the released person's proportionate share of any common liability, as determined in accordance with the provisions of section 3.

SEC. 8. APPLICATION.

This Act applies to any action for personal injury or death, or both, arising out of a maritime tort which occurs on or after the date of the enactment of this Act.

SEC. 9. DEFINITIONS.

In this Act—

(1) the term "fault" includes—

(A) acts or omissions that are in any measure negligent or reckless toward the person of the actor or others, or that subject a person to strict tort liability; and

(B) breach of warranty, misuse of a product for which a defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages;

(2) the term "injury" includes—

(A) personal injury to a claimant; and

(B) death of a claimant's decedent; and

(3) the term "party" includes all defendants, third-party defendants, and persons who have been released from liability under section 7.